ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
	)	
Implementation of Section 703(e)	)	
of the Telecommunications	)	CS Docket No. 97-151
Act of 1996	)	
	)	
Amendments of Rules and Policies	)	
Governing Pole Attachments	)	

REPLY COMMENTS OF BELL ATLANTIC

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REPLY COMMENTS OF BELL ATLANTIC[1]

I. Introduction and Summary

In describing its proposed amendments to Section 703 of the Telecommunications Act of 1996, the House described what it intended the Commission to do in prescribing pole attachment rates as follows:

> "[T]he Commission shall: (1) recognize that the entire pole, duct, conduit, or right-of-way other than the usable space is of equal benefit to all entities attaching to the pole and therefore apportion the cost of the space other than the usable space equally among all such attachments; (2) recognize that the usable space is of proportional benefit to all entities attaching to the pole, duct, conduit, or right-of-way and therefore apportion the cost of the usable space according to the percentage of usable space required for each entity; and (3) allow for reasonable terms and conditions relating to health, safety, and the provision of reliable utility service."

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[1] The Bell Atlantic telephone companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C. , Inc., Bell Atlantic-West Virginia, Inc., New York Telephone Company and New England Telephone and Telegraph Company.

Although the Conference Committee formally adopted the Senate provisions of the bill, it preserved the spirit and much of the actual wording of the House version reflected in that summary of Congressional intent. The Commission should adhere closely to those guiding principles in adopting regulations to implement Section 703(e) of the Act.[2]

In these comments, Bell Atlantic urges the Commission to:

- Confirm that negotiation is the primary method of establishing rates, terms and conditions for all pole attachments, and prohibit prospective attaching entities from gaining access to poles, conduits or rights-of-way until they have entered into a fully negotiated license agreement with the facility owner;
- Confirm that wireless providers are entitled to the same protections that Section 224 gives all wireline cable and telecommunications providers;
- Clarify that cable companies lose their preferential attachment rates when providing telecommunications services, including the transmission of information or other enhanced services for third parties;
- Provide that governmental attachments for public health and safety should be treated as other than usable space, the cost of which should be borne by all attaching entities, while governmental attachments for other purposes should be subject to the same rules as for other attaching entities;
- Establish that overlashing is permitted only with the consent of, and upon execution of a direct license agreement with, the pole owner;

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[2] 47 U.S.C. Section 224(e).

- Maintain the 12 inch presumption for traditional cable-type attachments in determining usable space rates, and multiply the per foot attachment rate by the number of feet of usable space actually utilized by wireless providers or for other non-standard attachments;
- Reject MCI's proposal to increase the presumptive height of a pole based on the space occupied by overlashers;
- Confirm that the incumbent local exchange carrier is not an attaching entity under Section 224 for purposes of allocating other than usable space costs;
- Permit utilities to develop their own presumptive number of attaching entities for purposes of allocating other than usable space costs;
- Define "other than usable" space costs in conduits as "all spare or excess capacity not actually being used by the conduit owner or any attaching entity;"
- Address issues concerning access to rights-of-way on a case-by-case basis, but establish broad guidelines that would ensure that (1) rates for such access reflect all costs (including capital costs) associated with use of such rights-of-way and (ii) facility owners are not required to violate state law or the terms of their agreements with underlying property owners in providing such access.

II. Negotiation Should Continue to Be the Primary Method of Resolving Attachment Disputes

The Commission correctly observes that the Pole Attachment Act, as amended, evidences a Congressional preference for negotiations between the parties as the primary method of resolving attachment disputes, which the Commission continues to

support.[3] In the absence of agreement between the parties, the state commission's regulations will govern the rates, terms and conditions for such attachments if that state has assumed jurisdiction over these matters.[4] It is only in the event that the negotiations fail and a state has not assumed jurisdiction over attachment issues that the Commission's rules under Section 224 would apply.[5]

The Commission's current rule requiring complainants to summarize all steps taken to resolve its complaint through negotiations before filing a complaint has worked well and the Commission is justified in its tentative conclusion to retain that requirement.[6] The Commission should not permit, however, prospective attaching entities to gain access to poles, conduits or rights of way while still in negotiations. Until an attaching entity executes a license agreement with the facility owner for use of the facility, the owner has no protection from liability due to the attaching entity's attachments. Moreover, permitting attachments in advance of agreement on terms, rates and conditions would undermine the prospective attacher's incentive to engage in good faith negotiation. In fact, ICG's proposal to allow the prospective attacher to pay the lowest rate offered by the utility during the period it attaches without a license[7] would

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[3] NPRM at para.12.

[4] 47 U.S.C. Sect. 224(c)(1).

[5] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Dkt No. 96-98, FCC 96-325 (rel. Aug. 8, 1996) ("Interconnection Order") at para. 1239.

[6] NPRM at para.12.

[7] ICG at 14-16.

encourage prospective attachers to place facilities and then delay concluding negotiations. The Commission should affirm that attaching entities may gain access only upon execution of a license agreement with the facility owner.

Also, the Commission should reject KMC's argument that the Act's requirement for nondiscriminatory access requires that all attachment agreements be identical with regard to rates, terms and conditions.[8] Since negotiation between the parties is the preferred means of determining attachment terms, it is up to the parties in the first instance to determine what particular terms should govern their relationship. One attacher's unique requirements may justify different treatment from those of another. The Commission should not adopt any blanket rule requiring identical rates, terms and conditions but permit the complaint process to determine on a case-by-case basis whether such differences are justified and whether a particular attaching party has been denied nondiscriminatory access.

III. Use of Attachment Space Must Comply with the Act's Requirements

A number of commenting parties suggest rules to govern the rates, terms and conditions for usable attachment space that are inconsistent with the plain language of the Act and must be rejected.

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[8] KMC at 3-5.

A. The Heritage Decision Has Been Superseded by the 1996 Act

The Commission asked whether its decision in the Heritage Cablevision case,[9] which prohibited pole owners from charging cable companies different rates for traditional cable and nonvideo attachments, should be extended to other circumstances involving conditions or limits on use of attachment space. It should not. First, the Heritage decision itself has been superseded by the passage of the Telecommunications Act of 1996, which amended the Pole Attachment Act in order specifically to create different attachment rates for providers of cable and telecommunications services.[10] Second, the Act's recognition of a utility's right to deny access based on capacity limits or on safety, reliability and generally applicable engineering standards[11] implicitly requires that such considerations be evaluated in light of the characteristics of the particular attachment proposed - coaxial fiber, copper cable, fiber optic cable, or other non-cable attachments. As a result, the Commission should permit utilities to condition or limit access based on a fact-specific evaluation of the safety and capacity issues raised by a particular access request.

B. Wireless Providers Are Entitled to the Protection of Section 224

The Commission should reject proposals, however, that would categorically exclude wireless telecommunications providers from Section 224's

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[9] Heritage Cablevision Assoc. v. Texas Utilities Elec. Co., 6 FCC Rcd 7099 (1991), *affirmed sub nom.* Texas Utilities Elec. Co. v. FCC, 997 F.2d 925 (D.C. Cir. 1993).

[10] *See* 47 U.S.C. Sections 224(d)(3) and 224(e).

[11] *See* 47 U.S.C. Section 224(f)(2).

protection against unjust, unreasonable and discriminatory rates, terms and conditions for attachments. Several commenters argue that rates, terms and conditions for wireless providers' attachments should be governed by the market rather than by Section 224, because they allege that wireless providers have alternatives to utility facilities when placing their equipment, such as antenna towers, railroad trestles, and other structures.[12] This assertion, undocumented by any record evidence, is suspect; the reluctance of many municipalities and private landowners to permit erection of antenna towers or lease space to accommodate wireless providers is no secret.[13]

Even if commenters were correct in this assertion, which they are not, the Commission would still lack the authority to exclude wireless providers from the ambit of Section 224, because its provisions apply to "any attachment by a... provider of telecommunications service."[14] A "telecommunications service," in turn is defined as "the offering of telecommunications for a fee directly to the public...*regardless of the facilities used.*"[15] Wireless providers are therefore entitled to the protection of the federal rules in the absence of negotiated or state-mandated rates, terms and conditions for attachments.

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[12] *See* American Electric Power Service Corp. et al at 11; EEI/UTC at 3-5.

[13] *See, e.g.,* Mike Mills and Yvonne Chiu, High-tech means trouble: The cellular industry wants U.S. protection as communities say no to a towering 'eyesore', Washington Post, July 31, 1995, Business Section, p. 5; Adam C. Smith, Cellular phone towers are a rising concern, St. Petersburg Times, Aug. 7, 1996, Neighborhood Times Section, p.1.

[14] *See* 47 U.S.C. Section 224(a)(4).

[15] 47 U.S.C. Section 3(46) (emphasis added).

The same presumptions concerning usable space allocations, however, may not apply to both wireline and wireless telecommunications providers. For example, while the one foot presumption continues to be appropriate for standard cable attachments, wireless providers may seek access to facilities to attach wireless antennas, which may well require more than one foot of usable space. The usable space rate for such wireless attachments, as well as for any other unique or non-standard cable attachment by any telecommunications provider, should therefore be the per foot rate for telecommunications attachments under Section 224(d)(3) or (e)(3), as appropriate, multiplied by the actual space occupied by the attachment and any related equipment.[16] Wireless providers would also be counted as attaching entities, for purposes of sharing the costs of the other than usable space, once the Commission's regulations implementing Section 224(e) of the Act become effective.

Wireless providers, and others with non-standard cable attachments, may also seek access to utility facilities for placement of associated equipment. If space and safety considerations permit, such attachments should be permitted on a first come, first served basis. To the extent, however, that mounting such equipment on the pole itself would exceed capacity limits or violate applicable electric codes or safety standards, wireless providers and other attaching entities should be required to place such equipment on a separate pad or structure provided by that attaching entity. Wireless providers and

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[16] Because wireless antennas ordinarily would be situated at the top of a pole with cabling running between the antenna and any associated equipment, any such vertical cabling should be excluded from the rate calculation because such cabling does not prevent use of the pole for horizontal attachments by others.

their attachments should otherwise be subject to the same rights and responsibilities as other attaching entities under Section 224.

C. Cable Companies Lose Their Preferential Rates When Providing Any Non-Cable Service

In the 1996 Act, Congress buffered cable companies from higher attachment rates due to the new statutory obligation for attaching entities to share the costs of the other than usable space beginning in 2001.[17] It did so by grandfathering rates for any pole attachment used by a cable television system "solely to provide cable service."[18] Cable companies, seeking to maximize their ability to continue to obtain the lower attachment rates, argue that the Commission should interpret the Act to permit cable operators that also provide telecommunications services to pay the higher rate on a *pro rata* basis, based on the percentage of their customers that subscribe to cable service and the percentage that subscribe to telecommunications services.[19] Their proposal is contrary to the plain language of the Act.

As NCTA admits, the architecture of most cable systems sends the same video and telecommunications signals past every home in the system, permitting any subscriber to choose to subscribe to the telecommunications services if he or she wishes.[20] Even if only a portion of the cable company's subscribers choose to subscribe to telecommunications services, however, the cable company is still "offering

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[17] *See* 47 U.S.C. Section 224(e).

[18] 47 U.S.C. Section 224(d)(3).

[19] *See* NCTA at 22-24; Comcast at 15-17; Adelphia et al at 9-10; CTTANY at 8

...telecommunications for a fee directly to the public..."[21] over those pole facilities. Since the *offering* of telecommunications for a fee to the public constitutes a "telecommunications service" under the Act,[22] the higher attachment rates under Section 224(e) are applicable whenever a cable system begins offering telecommunications services to its subscribers.[23]

The Commission should similarly reject the cable companies' contention that Congress intended to treat all information and other interactive services, such as Internet access services, as cable services.[24] Cable companies may only take advantage of the lower cable attachment rates if they are actually providing the content of such services, not merely transporting the enhanced or information services of third parties.

The Commission has repeatedly drawn a regulatory distinction between the *content* of information services, which is unregulated, and the *underlying transmission service* that delivers such services, which is a regulated telecommunications

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[20] *See* NCTA at 23.

[21] 47 U.S.C. Section (3)(46).

[22] *Id.*

[23] This conclusion is reinforced by Section 224(d)(3) of the Act, which states: "Until the effective date of the regulations required under subsection (e), this subsection shall also apply to the rate for any pole attachment used by a cable system...to provide any telecommunications service." By implication, the regulations in subsection (e), which require attachers to contribute to the common costs of the pole, would apply after effectiveness to any pole attachment used by cable operators to provide telecommunications services.

[24] *See, e.g.*, NCTA at 6, n. 9; Comcast at 18-20; CTTANY at 8.

service.[25] Most recently, in its Universal Service Order, the Commission distinguished between transmission of information services as a "telecommunications" service under the 1996 Act,[26] and the delivery of information service content, including information storage and protocol conversion, as a non-telecommunications service.[27]

The Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, *without change in the form or content of the information as sent and received.*"[28] When a cable operator, for example, provides cable modem service over its cable system, it is giving its subscribers access to the content of third party information service providers. The cable operator is not providing the content, and is not altering the form or content of the information as sent and received; rather it is merely transmitting the information between

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[25] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry),* 104 FCC 2d 958 at para. 11 (1986)(describing an enhanced service as "any offering over the telecommunications network which is more than a basic transmission service" or which "involve subscriber interaction with stored information"); *see also*, 47 C.F.R. Section 64.702(a).

[26] *Federal-State Joint Board on Universal Service*, Report and Order, CC Dkt No. 96-45, FCC 97-157 (rel. May 8, 1997)("Universal Service Order") at para. 432, n. 1117 ("Congress imposed no limits whatsoever on the telecommunications services for which eligible schools and libraries could arrange to receive discounts...Eligible schools and libraries are equally free to obtain support under Section 254(h)(1)(B) for plain old telephone service (POTS) lines to enable teachers to receive calls in the classroom, *ISDN services that connect classroom and library computers with information services*, private lines for connecting two school libraries to each others, or pagers to enable school security officials promptly to respond to hallway disturbances." (emphasis added). Cable modem services are directly analogous to the ISDN services categorized as telecommunications services by the Commission.

[27] Universal Service Order at para. 439 and n. 1145.

[28] 47 U.S.C. Section 3(43).

the third party ISP and the cable subscriber. In those circumstances, the cable operator would clearly be providing a telecommunications service over its system, and could no longer qualify for the lower cable attachment rates under Section 224(d). In contrast, if the cable operator itself provides the content of the information or other enhanced service, it would not be providing a telecommunications service and could continue to be qualify for cable attachment rates.

Even the language in the Conference Report on the 1996 Act, on which the cable companies rely in arguing that all information and enhanced services should qualify for cable rates, acknowledges this distinction: "[T]he conferees intend the amendment to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers *by the cable operator*, as well as enhanced services."[29] In contrast, when such services are made available by third parties, such as information service providers, there is no indication that Congress intended to change the Commission's longstanding classification of the transmission of such services as telecommunications services.

In summary, the Commission should follow the plain language of the Act and adopt rules that permit cable operators to continue to enjoy lower attachment rates under Section 224(d) *only* when they solely provide cable services, not when they transmit any telecommunications services over their system, including the transmission of information or other enhanced services for third parties.

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[29] H.R. Conf. Rep. No. 104-458, at 169 (1996) ("Conference Report") (emphasis added).

D. Government Attachments for Public Health and Safety Uses Should be Treated as Other Than Usable Space Rates; Other Government Attachments Should Be Subject to the Same Rules As Other Attachers

As the Commission observes in its NPRM,[30] many utilities are required to provide attachment space without charge to local governments under their franchise agreements in order to permit the government to attach traffic and street lights, or police and fire signaling circuits. Such attachments are intended to protect the public health and safety and should be considered other than usable space costs to be borne by all attaching entities and the facility owners.[31]

Attachments sought by government authorities for purposes other than protecting the public health and safety, such as placement of holiday lights, decorations, flags, banners and other decorative items, or for equipment to provide cable or telecommunications services should be subject to the same license and fee requirements (including rates for both usable and other than usable space) as for other attaching entities.[32] Given the increasing demand for attachment space, government authorities seeking attachment space for such non-essential or even competing services should be

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30 NPRM at para. 24.

31 Bell Atlantic Comments at 6-7.

32 In some jurisdictions, attachments for public health and safety are provided at a discounted rate, rather than without charge. In addition, in some jurisdictions, a facility owner may be required by existing agreements with municipal authorities to provide attachment space for reasons other than public health and safety. In either case, such arrangements should be grandfathered. All attachment space utilized by the government pursuant to existing agreements should be treated as other than usable space, the costs of which should be borne by all attaching entities. (In the case of discounted rates, only the difference between the standard pole attachment rate and the discounted rate would be borne by all attaching entities.)

treated in the same manner as other attaching entities. Requiring governmental entities to enter into license agreements with facility owners for these attachments also gives utilities additional protection from liability for such attachments. Moreover, other attaching entities and facility owners should not be required in the future to absorb the costs of attachment space required for such non-essential or even competing municipal services.

E The Pole Owner's Consent Must Be Obtained For Overlashing

Among the most contentious issues in this proceeding is the question regarding the circumstances under which overlashing may be permitted. Many commenters agree that overlashing should be permitted only with the consent of, and upon execution of a direct license agreement with, the pole owner, in order to allow the owner to evaluate safety considerations, protect itself from liability, and ensure that the owner knows the identify of those whom it must bill for the unusable cost of the pole, and to whom it must provide notification of anticipated modifications and of emergency situations.[33]

AT&T has mischaracterized, and appears to have fundamentally misunderstood, Bell Atlantic's position on overlashing.[34] AT&T suggests that Bell Atlantic "oppose[s] third party overlashing" because it would allow overlashers to avoid paying their fair share. AT&T argues that the right of access to pole space "includes the right to place attachments that do not inhibit the integrity of the pole or violate sound

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[33] *See, e.g.,* Bell Atlantic Comments at 2.

[34] *See* AT&T Comments at 6 n.7, and 8, n.9.

engineering practices..., including overlashing," and that overlashers should only be required to pay for the space they actually use, which is less than one foot of pole space. Contrary to AT&T's implications, Bell Atlantic has not proposed to charge overlashers *any* usable space charge since they, in effect, piggyback on the usable space utilized by others. Bell Atlantic's statement that overlashers must "pay their fair share" refers to the statutory requirement that they contribute, as attaching entities, to the cost of the other than usable space. Moreover, Bell Atlantic has not opposed overlashing *per se*; the only question is whether the facility owner has the right to give prior consent (or deny access for reasons permitted by the Act) before any overlashing occurs on its facilities. As the Commission has previously held, attaching entities do not acquire any ownership interest in the facility to which they attach; they merely enjoy a right of access under Section 224.[35] Such a right of access does not extend to permitting third parties also to use the facility owner's private property without the facility owner's consent.[36] In fact, AT&T acknowledges that the facility owner retains the right to deny access to its facilities for reasons of capacity limitations, safety concerns or other permitted reasons to deny access under Section 224(f)(2). It makes no sense to suggest that the facility owner has that right in any meaningful sense unless the facility owner can determine at the outset – before the third party attaches -- whether or not the attachment should be permitted.

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[35] Interconnection Order at para. 1216.

[36] By the same token, existing attachers should not be permitted to enter into a new line of business at the facility owner's expense, by charging third parties for the right to overlash to their attachments.

MCI asserts, without reference to any safety or engineering standards, that "each attachment can support overlashings up to 3 inches in diameter without adding stress to the pole."[37] As a result, MCI advocates that two or three 1 or 1.5 inch cables could be overlashed without raising any safety concerns, or presumably, any consent from the pole owner.[38] MCI's underlying assumption is simply incorrect. As MCI itself observes, increasing the diameter of the overlashed cable places additional stress due to lateral wind loads.[39] In fact, increasing the diameter of the cable bundle increases the surface area to be affected by both wind and ice accumulation. That additional stress occurs as soon as the diameter of the cable increases to any extent, and must be taken into consideration in determining if the pole is strong enough to accommodate the additional attachment. Consequently, the pole owner must have the opportunity to evaluate safety considerations with regard to the addition of *any* overlashed cable and consent to the additional attachment.

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[37] MCI Comments at 8.

[38] MCI goes so far as to suggest that each attaching entity could attach up to 4-6 additional attachments, presumably all without the pole owner's knowledge or consent, by using both sides of the pole and the same bolt-through. MCI at 8-9. For reasons explained more fully in footnote 43, attachers should not be permitted routinely to attach on both sides of poles.

[39] *Id.*

IV. Usable Space Rates Must Be Based on Reliable Safety Standards and the Act

A. The 12 Inch Presumption for Traditional Cable-Type Attachments Should Not Be Altered

The Commission should not alter its current presumption that the amount of usable space occupied by traditional cable attachments in twelve inches.[40] Two commenters, however, suggest either decreasing the current 12 inch presumptive usable space allocation for such attachments to 6 inches (9 inches if cables are overlashed)[41] or, in the case of fiber optic cables, increasing it to 24 inches.[42] Both suggestions should be rejected.

ICG claims that the Commission's one foot presumption is "outdated," asserting that "the most widely accepted engineering standard...supports an allocation of six inches, not one foot, of usable space for simple communications attachments below the safety space." Yet, tellingly, ICG cites no authority in support of its claims. Longstanding industry best practices, as codified in Bellcore's Manual of Construction Procedures (the "Blue Book"), however, explicitly provide that "[t]he clearance between communications cables supported on different suspension strands must be at least 12

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[40] As explained above at 8, non-cable attachments, such as attachment of antennas by wireless providers, should be charged a multiple of the per foot attachment rate equal to the amount of usable space actually utilized by that attachment.

[41] ICG at 40-41.

[42] Duquesne Light at 35-36.

inches (300 mm) at the pole."[43] No contrary authority compels a change in the existing standard.

Duquesne Light suggests that, while the rebuttable presumption of one foot is fine for non-fiber optic cables, a rebuttable presumption of two feet of usable pole space should be established for fiber optic cables because some communications companies pull such cable tightly, interfering with properly sagged cables above them. Adopting Duquesne's approach would unnecessarily limit the number of attaching entities that could be accommodate on a pole, due to the carelessness of other attachers. A better approach is to affirm the right of utilities to enforce the provisions of the National Electric Safety Code, which require parallel attachments to maintain appropriate clearances both at the pole and at mid-span.[44]

B. MCI's Proposal to Increase the Presumptive Height of a Pole Based on Additional Usable Space Occupied By Overlashers Should Be Rejected

MCI's proposal to increase the presumptive pole height by the amount of additional usable space allegedly created by overlashing should be rejected by the Commission.[45] Overlashing does not increase the amount of usable space on a pole; it

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[43] Bellcore Blue Book, Section 3.2 (Issue 2, December 1996). Although the Blue Book permits a 12 inch diagonal clearance in some circumstances, that would require attachments to be placed on both sides of the pole. "Boxing" a pole with attachments on both sides interferes with climbing space for maintenance workers, and significantly complicates removal and reinstallation of poles in need of repair or replacement.

[44] National Electric Safety Code, "Sag-Related Clearances," Rule 235C2b (1997 edition).

[45] MCI at 6.

merely makes more efficient use of the actual usable space by permitting, in essence, a horizontal buildout. Because the Act requires rates for usable space to be based upon the percentage of total usable space required for each attachment, overlashed attachments should not be counted in determining the per attachment rate for usable space.[46]

That horizontal buildout capacity, moreover, is not subject to the kind of blanket presumptions regarding multiple attachments on which MCI's proposed usable space formula is based. As noted above,[47] MCI's assumption that each attachment can accommodate anywhere from 2-6 overlashed attachments without causing additional load stress is fantasy. It rests on the erroneous and dangerous assumption that multiple additional overlashed attachments could be permitted on any pole without adding ice or wind load stress.

If the Commission, therefore, were to adopt MCI's concept of increasing the presumptive height of a pole by the number of overlashed attachments - which it should not do, the Commission should not adopt MCI's formula, which relies on a theoretical and overstated number of possible attachments. Instead, the Commission would have to modify its proposed usable space rate formula in order to introduce an element to determine presumptive pole height. That presumptive pole height must reflect the reality of overlashing; consequently, the Commission should permit utilities to estimate the average number of attachments on their poles, including overlashed

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[46] Because overlashers occupy no additional usable space, Bell Atlantic has advocated that they pay no usable space fee for overlashing but that they contribute their fair share to the other than usable costs as an attaching entity.

[47] *Supra* at 16.

attachments, and to alter the presumptive pole height, if necessary, accordingly. Under this approach, however, overlashers – whether existing attachers who have overlashed additional attachments to their own facilities or third parties overlashing to existing attachments – would be required to pay for a portion of this new presumptive usable space, as well as a portion of other than usable space.

C. AT&T's Proposed Modification to the Usable Space Formula Is Not Needed to Prevent Double Recovery of Pole Costs

AT&T claims that the current pole attachment rate formula for usable space must be modified in order to prevent pole owners from double recovering pole costs.[48] AT&T's analysis is flawed and, as shown in Appendix A, its proposed modification would not even allow for full recovery of usable space costs.

AT&T incorrectly modifies the formula by adding the additional step of *multiplying* the space occupied by an attachment over total usable space *by the total usable space over the pole height.* The result is the percentage of total pole space, rather than the percentage of usable space, as required by the Act. As a consequence, the combination of AT&T's modified usable space formula and the proposed other than usable space formula would result in underrecovery of 1/3 of the total cost of the pole.[49] The correct calculation for the usable space component of the pole attachment formula is simply the space occupied by an attachment over total usable space, as proposed by the Commission.[50]

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48 AT&T at 15-16 and Appendix C.

49 *See* Appendix A.

50 NPRM at para. 29.

V. Other Than Usable Space Rates Must Comply With the Act

A. Unusable Space Costs Must Be Allocated Among Attaching Entities

Section 224(e)(2) requires the cost of the other than usable space be shared among all "attaching entities." Despite that unambiguous language, some commenters nevertheless suggest that the Commission instead require allocation of such costs based on the total number of attachments[51] or the portion of space occupied,[52] rather than the number of attaching entities. The Commission lacks authority to adopt a standard that is different from that mandated by Congress, and must reject proposals to the contrary.

There is general agreement that third parties who are permitted to overlash to existing attachments count as "attaching entities" for purposes of allocating other than usable costs. They have attached to the facility and they share with all existing attachers the benefits of the other than usable space.

There is, however, significant disagreement as to whether an incumbent local exchange carrier (ILEC) who owns a facility solely or jointly with an electric utility, should be considered an attaching entity for purposes of allocating the unusable space costs of that facility. Those who urge the Commission to treat the ILEC as an attaching entity suggest that the Commission should read narrowly the exclusion of ILECs in Section 224(a)(5) from the definition of a telecommunications provider so as to impose on ILECs all of the burdens of Section 224 but to withhold any of its protections.

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[51] *See* MCI at 12.

[52] *See* RCN at 3.

Such an interpretation would force ILECs unfairly not only to contribute a share of 2/3 of the other than usable costs of the facility but also to absorb, wholly or jointly with the electric company, the remaining 1/3 of such costs.[53] It also creates a complexity of multiple contribution requirements solely for facility owners that is not clearly and unambiguously required by the statute and is illogical.

Moreover, in light of the Commission's previous decision to exclude ILECs from being able to claim the benefits of Section 224 as an entity attaching to facilities owned by others,[54] it would be arbitrary and capricious to count ILECs as attaching entities for purposes of bearing a portion of the cost recovery contribution assigned by the Act to those entitled to the protections of Section 224. If the Commission, therefore, should decide to include ILECs in the definition of attaching entities for purposes of allocating unusable space costs, it must reconsider and reverse its earlier decision to deny ILECs the same rights as other attaching parties under Section 224.

B. Utilities Should Be Permitted to Develop Their Own Presumptive Number of Attachers for Determining Unusable Space Rates

Many commenters agree that the Commission should not adopt a blanket presumption of the average number of attachers per pole for purposes of determining other than usable space rates. Instead, since the number of attachers may vary widely from region to region and even from area to area within regions, each utility should be permitted to develop its own presumptive average(s) (including, if appropriate, different

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[53] 47 U.S.C. Section 224(e)(2).

[54] Interconnection Order at para. 1123, n. 2734, and para. 1231.